

1997

The State of Utah v. Shannon Ashcraft : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 970069-CA

Attorney for Defendant/Appellant

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,

Plaintiff/Appellee

vs.

SHANNON ASHCRAFT,

Defendant/Appellant.

*
* Appellate No.: 970069-CA
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* Priority No.: 2
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BRIEF OF DEFENDANT/APPELLANT SHANNON ASHCRAFT

THIRD DISTRICT COURT, 1008 E. COMING
JUDGE: A. NELSON

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COURT OF APPEALS

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THE STATE OF UTAH,

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vs.

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* Appellate No.: 970069-CA
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BRIEF OF DEFENDANT/APPELLANT SHANNON ASHCRAFT

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TABLE OF CONTENTS

TITLE	PAGE NO.
Table of Authorities.....	ii
Statement of Jurisdiction.....	2
Statement of the Issue Presented For Review and Standard of Review.....	2
Determinative Provisions.....	3
Statement of Case.....	3
Statement of Relevant Facts.....	4
Summary of Argument.....	5
Argument.....	6
Conclusion.....	11
Certificate of Mailing.....	12
Exhibit 1.....	13
Exhibit 2.....	14

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page No.</u>
State vs. Brown, 835 P.2d 851 (Utah 1992).....	2, 3, 6, 7, 11
State vs. Gordon, 913 P.2d 350 (Utah 1996).....	3, 6, 7
State vs. Robertson, 886 P.2d 85 (Utah App. 1994).....	9

CONSTITUTIONAL PROVISIONS AND STATUTES

Utah Code Ann. Section 78-2a-3(2)(e).....	2
Utah Code Ann. Section 10-3-928.....	8
Utah Code Criminal Procedure, Section 77-32-1.....	9, 10
Utah Code Criminal Procedure, Section 77-32-1(4).....	6, 10
Utah Rules Criminal Procedure, Section 26(2)(a).....	2
Utah Rules Criminal Procedure, Section 77-18a-1(1)(a).....	2

STATEMENT OF JURISDICTION

Defendant/Appellant Shannon Ashcraft, hereby appeals to the Utah court of Appeals from the final criminal judgment and conviction rendered against him on December 23, 1996, by the Honorable L.A. Dever, Judge, Third Judicial District Court in a for Tooele County, State of Utah, convicting him of two counts of Forgery, Third Degree Felony, and two counts of Theft, a Class B Misdemeanor and a Class C Misdemeanor. This Court has jurisdiction over Defendant/Appellant Ashcraft's appeal pursuant to Utah R. Crim. P. 26(2)(a); Section 77-18a-1(1)(a); and Utah Code Annotated Title 78-2a-3(2)(e), whereby an appeal from the court of record in a criminal action may take an appeal to the Court of Appeals from a final order for anything other than a first degree or capital felony.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW AND THE STANDARD OF REVIEW

Issue

Defendant/Appellant Ashcraft raises one primary issue for appeal:

1. **Whether defendant/Appellant, Shannon Ashcraft was denied due process of law and effective assistance of counsel when the court appointed Attorney Ronald Elton as his trial counsel.**

Standard of Review

This Court reviews a denial of due process of law and effective assistance of counsel under a abuse of discretion standard: State vs. Brown, 835 P.2d 851 (Utah 1992).

DETERMINATIVE PROVISIONS

Defendant/Appellant submits the following as representative of determinative law.

- a. State vs. Brown, 835 P.2d 851 (Utah 1992).
- b. State vs. Gordon, 913 P.2d 350 (Utah 1996)

STATEMENT OF CASE

I. Nature of Case

This is an appeal from a final judgment and conviction rendered on December 23, 1996 in the Third Judicial District Court in and for Tooele County, State of Utah, the Honorable L.A. Dever presiding, convicting Defendant/Appellant Ashcraft of Forgery, a Third Degree Felony, and Theft, a Class B Misdemeanor.

II. Course of the Proceedings and Disposition at Trial Court:

On or about March 18, 1996, Defendant/Appellant Ashcraft appeared for a felony first appearance in the Third Judicial District Court, Tooele County, State of Utah, before the Honorable L.A. Dever. The Court appointed public defender Ronald Elton to represent the Defendant/Appellant on the criminal charges filed against him. On or about April 15, 1997, Defendant/Appellant Ashcraft appeared with his Court appointed counsel, Ronald Elton. Defendant/Appellant Ashcraft entered a plea of not guilty to the charges. On or about June 11, 1996, the case was tried before a jury and Defendant/Appellant Ashcraft was found guilty of two counts of Forgery, Third Degree Felonies, and two counts of Theft, a Class B Misdemeanor and a

Class C Misdemeanor. On September 30, 1996, Court appointed counsel, Ronald Elton filed a withdrawal of counsel. Judge L.A. Dever subsequently appointed the law office of Parker, Freestone, Angerhofer & Harding to represent the Defendant/Appellant at sentencing. On December 23, 1996, Defendant/Appellant Ashcraft was sentenced to the Utah State Prison to serve a sentence of 0-5 years on counts 1 & 2, 6 months on count 3, and 90 days for Count 4. Said sentences were ordered to run concurrently with each other.

STATEMENT OF RELEVANT FACTS

On or about March 18, 1996, defendant appeared for felony first appearance and Public Defender Ronald Elton was appointed to represent the defendant.

On or about March 21, 1996, Mr. Elton entered his appearance of counsel and filed a Request For Discovery.

Defendant/Appellant appeared for arraignment with his court appointed attorney, Ron Elton on April 15, 1996, and plead not guilty to the charges. On June 11, 1996, trial before a jury was held with Ron Elton representing the defendant/appellant. Defendant/Appellant was found guilty on all four counts.

At the time Attorney Ron Elton represented the Defendant/Appellant during his trial in the Third District Court, Tooele County, Mr. Elton was also the City Attorney for the cities of Grantsville, Stockton and Rush Valley, in Tooele County, State of Utah. Defendant/Appellant contends that Mr. Elton's employment as the city attorney for the above-mentioned cities while he

represented the defendant/appellant in a criminal prosecution was a conflict of interest, thus, defendant/appellant was represented by ineffective assistance of counsel.

On or about September 30, 1996, Attorney Ron Elton, filed a withdrawal of counsel as defendant/appellant's attorney.

On or about December 17, 1996, the law office of Parker, Freestone, Angerhofer & Harding was appointed by the court to represent the defendant/appellant at sentencing.

On or about December 23, 1997, defendant/appellant was sentenced to the Utah State Prison to the above-mentioned term.

On or about May 13, 1997, defendant/appellant filed a Motion To Remand For Determination Of Ineffective Assistance of Counsel.

On or about June 20, 1997, the Court of Appeals denied defendant/appellant's Motion to Remand.

SUMMARY OF ARGUMENT

Defendant/Appellant was represented by court appointed public defender, Ronald Elton, who, at the time he represented Defendant/Appellant, was the city attorney for the cities of Grantsville, Rush Valley and Stockton, Utah, cities which are located in Tooele County, the same county as Defendant/Appellant was prosecuted, tried and convicted.

The Courts have concluded that as a matter of public policy and pursuant to inherent supervisory power over the courts, and the express power to practice law, that counsel with

concurrent prosecutorial obligations may not be appointed to defend indigent persons.

Defendant/Appellant was indigent, and Elton was appointed to represent him. Elton's duties as a city attorney in Grantsville and his duties as a public defender in the same county created an inherent conflict of interest, constituting ineffective assistance of counsel.

ARGUMENT

I. DEFENDANT/APPELLANT'S DUE PROCESS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL WAS COMPROMISED WHEN ELTON WAS APPOINTED AS PUBLIC DEFENDER TO REPRESENT ASHCRAFT FOR THE CRIMINAL CHARGES IN TOOELE COUNTY.

Ashcraft claims that Elton's employment as a city attorney in Grantsville, while he was representing Ashcraft in the Third District Court, Tooele County, constituted a conflict of interest and a violation of Ashcraft's due process rights, and right to effective assistance of counsel. In State vs. Brown, 853 P.2d 851 (Utah 1992) the Court did not decide whether it was constitutionally impermissible to appoint a city attorney with prosecutorial responsibilities to represent an indigent defendant. However, the Court in Brown Id. did conclude that a vital interest of the criminal justice system are jeopardized when a city prosecutor is appointed to assist in the defense of an accused. The Court held that as a matter of public policy and pursuant to their inherent supervisory powers over the courts, as well as their express power that govern the practice of law, counsel with concurrent prosecutorial obligations may not be appointed to defend indigent persons. See State vs. Gordon, 913 P.2d 350 (Utah 1996).

Brown cited Utah Criminal Code Ann. Sec 77-31-1(4), which requires that counties,

cities, and towns providing counsel for indigent defendants, “ [a]ssure undivided loyalty of defense counsel to the client”. The court set forth that the undivided loyalty is compromised when an attorney with prosecutorial responsibilities represents an indigent defendant. The court set forth examples such as: city police officers are often primary witnesses for the prosecution, and if those same police officers are called to testify in a case a city attorney is defending, the city attorney may be disinclined to vigorously and abrasively cross-examine these witnesses because such conduct might compromise cooperation in future prosecutions. Additionally, counsel may be reluctant to attack inappropriate conduct by the police. A conflict of interest would operate to deprive a criminal defendant of the undivided loyalty of defense counsel which he is entitled.

Another case in which the defendant had been represented by a part-time city prosecutor is State vs. Gordon, 913 P.2d 350, (Utah 1996). The defendant was charged and convicted of a crime in 1983 in Brigham City. Defendant Gordon was indigent and the court appointed attorney Clinton S. Judkins, who was a part-time prosecutor for the city of Tremonton. Some nine years later, Defendant filed a motion for new trial contending that his constitutional right to an appeal was denied because Judkins had failed to pursue the appeal due to his conflict of interest as a city prosecutor. Consequently, the motion for new trial was denied and Defendant filed for post conviction relief. Subsequently, the court ruled against Gordon due to the fact that the decision made in Brown was not retroactive. The courts decision in Brown announced for the first time that counsel with concurrent prosecutorial duties could not represent indigent defendants, a clear

change from past procedures. The court previously held that when a new rule governing criminal procedure constitutes a clear break with the past, it is not generally applied retroactively. However, the appointment of counsel in the present case occurred after the ruling in Brown.

II. ATTORNEY RONALD ELTON WAS THE CITY ATTORNEY FOR GRANTSVILLE AND HAD PROSECUTORIAL DUTIES.

Although Elton represented to the State that he advised the city only on civil matters, and the State claims that the City of Grantsville contracts with the Tooele City prosecutor for prosecutorial representation. (Footnote 1 in Objection to Rule 23B Remand Request Exhibit 1). Procedures in Grantsville appear to be otherwise. In a document entitled “Rules Of the Justice Court, Grantsville, Utah”, page two, paragraph three, specifically states that, “...case will be prosecuted by the Grantsville City Attorney, Mr. Ronald Elton...” (See Exhibit 2).

Furthermore, the city attorney in a small community such as Grantsville, holds a supervisory position over any attorney appearing before the court for civil and/or criminal matters. Mr. Elton would have input into which cases the city would prosecute and who would be the prosecutor on those cases, with himself having the authority to prosecute the cases.

Mr. Elton as the Grantsville City Attorney has the authority to prosecute infractions and misdemeanors in the city where he is the city attorney. Pursuant to Utah Code Sec. 10-3-928:

In cities with a city attorney, the city attorney may prosecute violations of city ordinances, and under state law, infractions and misdemeanors occurring within the boundaries of the municipality and has the same powers in respect to the violations as are exercised by a county attorney or district attorney, including, but

not limited to, granting immunity to witnesses. The city attorney shall represent the interest of the state or the municipality in the appeal of any matter prosecuted in any trial court by the city attorney. See State vs. Robertson, 886 P.2d 85 (Utah App. 1994).

In Robertson Id. the defendant challenged the constitutionality and authority of the city attorney to prosecute cases without being an elected officials. The court ruled that city attorneys are authorized to prosecute certain cases in the name of the State, relieving the duty, but not the authority, of the county and district attorneys and the attorney general to conduct the prosecutions.

Defendant/Appellant claims that since Mr. Elton had the authority to prosecute cases as the city attorney and to supervise any other attorney acting as prosecutor, he would not have been diligent in representing the Defendant as a public defender. In order to represent a defendant in a criminal prosecution, defense counsel is usually challenging the constitutionality of the laws and circumstances surrounding the case against the defendant. For example: a defendant may be challenging the constitutionality of an illegal search and seizure. The defense attorney would attempt to discredit the search and seizure and state that it violated the defendant's rights. A city attorney may very well have a similar set of circumstances when prosecuting a case for the city wherein he attempts to say that the search and seizure was constitutional. The public defender may hesitate to attack the constitutionality of the very laws that they are sworn to uphold as prosecutors.

Utah Code of Criminal Procedure 77-32-1, provides that each county, city, and town shall

provide for the defense of indigent person in criminal cases in the courts and various administrative bodies of the state in accordance with minimum standards”. 77-32-1(4), (assure undivided loyalty of defense counsel to the client). The county of Tooele has failed to provide the Defendant/Appellant with counsel with undivided loyalty. It would appear that Mr. Elton’s loyalty would lie with the city attorney position in that he would not be diligent in pursuing and challenging the witnesses or evidence against the Defendant. Mr. Elton had the legal authority to prosecute pursuant to Utah code of Criminal Procedure 77-32-1, he in fact prosecuted as evidence by the Rules of the Justice Court of Grantsville, and he would have had supervisory authority over any other attorney that prosecuted on behalf of Grantsville. Further facts to support Defendant/Appellant’s position that Mr. Elton had a concurrent prosecutorial role was sought by means of a Rule 23B remand motion but was denied by this court. Since neither Defendant/Appellant’s trial counsel, nor the State, has a vested interest in freely and voluntarily providing additional information that would tend to establish the concurrent prosecutorial role of Mr. Elton, Defendant/Appellant appeals to this court to conclude as a matter of public policy and pursuant to its inherent supervisory power over the courts to find ineffective assistance of counsel.

III. THE COURT TO REMAND A CASE WHERE DEFENSE COUNSEL HAS DUAL OBLIGATIONS AS A CITY ATTORNEY AND DEFENSE ATTORNEY.

Defendant/Appellant Ashcraft does not have to show that he was prejudiced by his representation from Mr. Elton. The mere fact that Mr. Elton represented the Defendant/Appellant

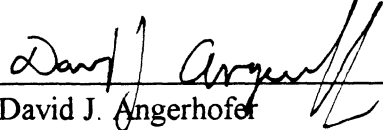
in a criminal prosecution, while he was a city attorney in a city in the same county, is enough for the court to reverse the Defendant/Appellant's conviction. The court ruled in Brown, Id., that a concrete showing of prejudice would be very difficult to make when a prosecutor is appointed to assist in the defense of an accused. The court concluded that it was unnecessary and ill-advised to pursue a case-by-case inquiry to weigh actual prejudice. Instead, it announced a per se rule of reversal wherever such dual representation was undertaken so as to prevent its recurrence.

As a result of Mr. Elton representing the Defendant/Appellant in a criminal prosecution while the city attorney, Defendant/Appellant's Sixth Amendment rights have been violated and reversal of his conviction is necessary.

CONCLUSION

Based upon the foregoing, the Defendant/Appellant respectfully requests that the court find that his rights were violated and he received ineffective assistance of counsel by his being represented in a criminal prosecution by Mr. Elton, while Mr. Elton was the city attorney for the city of Grantsville, Tooele County, State of Utah.

DATED this 30 day of July, 1997.



David J. Angerhofer
Attorney for Defendant/Appellant

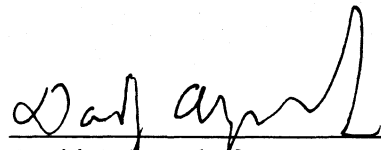
CERTIFICATE OF MAILING

I hereby certify that the above and foregoing BRIEF OF DEFENDANT/APPELLANT SHANNON ASHCRAFT was delivered through the United States Postal Service to the following:

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DATED this 31 day of July, 1997



David J. Angerhofer
Attorney for Defendant/Appellant

EXHIBIT 1

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

v.

SHANNON ASHCRAFT,

Defendant/Appellant.

***OPPOSITION TO RULE 23B
REMAND REQUEST***

Case No. 970069-CA

Defendant requests a remand under rule 23B, Utah Rules of Appellate Procedure, to determine whether his trial counsel, Ron Elton, was ineffective. The sole basis for this request is the defendant's belief that Mr. Elton was a city attorney for Grantsville at the time of the trial. Under *State v. Brown*, 853 P.2d 851, 856-57 (Utah 1992), defendant argues, trial counsel's city position barred him from serving as a legal defender.

Defendant, however, reads too much into *Brown*, which bars only city attorneys with "prosecutorial functions" from serving as defense counsel. *Brown*, 853 P.2d at 857. There, the Utah Supreme Court ruled, on the basis of its inherent supervisory

powers, that “counsel with concurrent prosecutorial obligations may not be appointed to defend indigent persons.” *Id.* Defendant fails to allege either in his affidavit or his memo that Mr. Elton had prosecutorial responsibilities.¹ He claims only that trial counsel was a city attorney.

Additionally, and fundamentally, defendant also misreads the scope of rule 23B. A remand under that rule is available only “for the purpose of entering findings of fact relevant to a claim of ineffective assistance of counsel.” Utah R.App.P. 23B(a) (1997). The supreme court in *Brown* carefully avoided any language that would imply a constitutional, i.e., sixth amendment, basis to its ban on appointment of city prosecutors as defense counsel. *Brown*, 853 P.2d at 856.

Indeed, the court emphasized that its decision was not constitutionally based. *Id.* On the other hand, the decision rested on public policy and the court’s inherent supervisory power. The supreme court recently reaffirmed this non-constitutional reasoning in *State v. Gordon*, 913 P.2d 350, 354 (Utah 1996), over the strident dissent of Justices Stewart and Durham, who both claimed that the sixth amendment was the grounding for the ban. An allegation that defense counsel was a city prosecutor, even if true, does not establish a claim under ineffective assistance law, but merely under the

¹ Mr. Elton has represented to the State that he advised the city only on civil matters. The City of Grantsville contracts with the Tooele City prosecutor for prosecutorial representation. Mr. Elton has no control over prosecution. Further, Mr. Elton does not, and never has, represented Stockton or Rush Valley, as defendant claims.


court's general powers to regulate the profession and the lower courts. This claim does not justify a rule 23B hearing, which is available only to ferret out facts regarding ineffective assistance.²

CONCLUSION

Defendant's request for a rule 23B remand should be denied.

RESPECTFULLY SUBMITTED THIS 20 May 1997.

JAN GRAHAM
UTAH ATTORNEY GENERAL


JAMES H. BEADLES
Assistant Attorney General
Criminal Appeals Division

² Defendant nowhere claims actual ineffective assistance under the *Strickland* doctrine.

CERTIFICATE OF MAILING

On 20 May 1997, I mailed, by U.S. Mail, postage prepaid, a copy of this

OPPOSITION TO RULE 23B REMAND REQUEST to:

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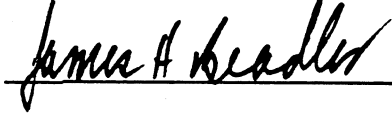


EXHIBIT 2

RULES OF THE JUSTICE COURT

#14201

GRANTSVILLE CITY, UTAH

As a result of a citation having been issued to you or as a result of your arrest, the above entitled court has jurisdiction over your case, and advises you of the following procedures of the court and rights that you are entitled to:

FIRST APPEARANCE:

1. You have the right to be informed of the charge(s) brought against you and to be furnished a copy of said charge(s).
2. You have the right to retain counsel or have counsel appointed by the court without expense to you, if you are unable to obtain your own counsel.
3. You have the right to be advised of bail or other circumstances under which you may obtain a pre-trial release.
4. You have the right not to make any statement and any statements you do make may be used against you in a court of law.
5. You have the right to have a reasonable time and opportunity to counsel before proceeding further, and if you desire to proceed without counsel, you must so state in open court.
6. The Judge will ask you to enter a plea to the charge(s):
 - (a). If you enter a guilty plea, you will be sentenced by the court, as provided by law.
 - (b). If you enter a not guilty plea, a trial date shall be set and it may not be extended except for good cause shown.

GUILTY PLEA: Before the court can accept a plea of guilty or no contest to the charge(s) the court must make the following findings:

1. That if you are not represented by counsel, you have knowingly waived your right to counsel or do not desire to be represented.
2. That the plea is voluntarily made.
3. That you understand your right against compulsory self-incrimination, right to a jury trial and to confront and cross-examine in open court the witnesses against you and that by entering the plea you waive all these rights.
4. That you understand the nature and elements of the offense to which you are entering a plea; that upon trial the prosecution would have the burden of providing each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements.
5. That you know the minimum and maximum sentence that may be imposed upon you for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences.
6. Whether the tendered plea is a result of a prior plea discussion and plea agreement and if so, what agreement has been reached. If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the same must be approved by the court. If recommendations as to sentence are to be made to the court, you are informed that any such recommendation as to sentence is not binding on the court.

(See reverse side)

~~NOT GUILTY PLEA:~~ If you enter a not guilty plea, the court will set a trial date. AT the trial:

1. You have the right to appear and defend in person or by counsel.
2. You must be present unless you consent in writing to a trial in your absence.
3. If you voluntarily absent yourself, the trial may proceed without you, and you may be found guilty and a verdict and sentence may be imposed in your absence.
4. The trial shall be without a jury unless you make a written demand, which must be received by the court at least five (5) days prior to trial. (Excluding intermediate Saturdays, Sundays and legal holidays)
5. The case may proceed without a formal information (Complaint) being filed if you consent in writing that the citation constitute the formal charges upon which the trial may proceed.

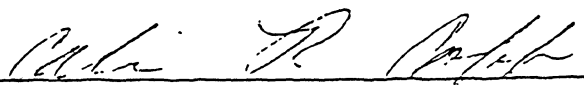
FORFEITURE OF BAIL: With the court's approval, you may voluntarily forfeit bail without appearance or after having posted bail, such voluntary forfeiture shall be entered as a conviction and treated the same as if you pleaded guilty.

PLEA NEGOTIATIONS - CONTINUANCES: All plea negotiations with the prosecutor or requests for a continuance must be presented to the court at least two (2) days prior to the trial date. Thereafter, no plea to a lesser offense or continuance will be allowed by the court except for good cause shown.

Your case will be prosecuted by the Grantsville City Attorney, Mr. Ronald Elton, Tooele County Courthouse, 47 South Main Street, Tooele, Utah 84074. Telephone number 882-9120. You or your attorney may contact that office for information concerning the charge(s) or trial.

I have read the foregoing and understand the procedures of the court and rights as stated.

Dated this 1 day of September, 19 94.



Signature of Defendant